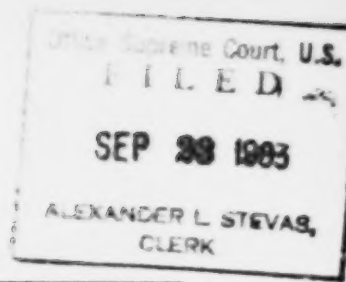


No. 82-2030



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

DAMON TUCKER ANDERSON,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Court of
Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

MICHAEL C. TURPEN
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Counsel for Respondent

September, 1983

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QUESTIONS PRESENTED FOR REVIEW

1. Does the warrantless search of a football field sized marijuana field violate the Fourth Amendment when the field is a significant distance from the curtilage area?

2. Does the search warrant, which was obtained after narcotics agents observed a large field of marijuana in an open field, sufficiently describe the location to be searched, the items to be seized and was the search warrant issued upon probable cause?

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I. The opinion of the Oklahoma Court of Criminal Appeals is consistent with existing Fourth Amendment law in that the search of the petitioner's premises was made pursuant to the open fields doctrine; furthermore, this is not an appropriate case for certiorari since there was conflict- ing testimony concerning the exis- tence of a sign along a roadway to the petitioner's property	8

- II. The search warrant adequately described the place to be searched, the items to be seized and clearly sets forth probable cause for belief that the items sought were on the property searched

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No. 82-2030

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DAMON TUCKER ANDERSON,
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vs.

STATE OF OKLAHOMA,
Respondent.

**On Petition for a Writ of Certiorari to the Court of
Criminal Appeals of the State of Oklahoma**

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

The respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the petition for writ of certiorari seeking

review of the Opinion of the Court of Criminal Appeals of the State of Oklahoma entered on February 10, 1983, and to which rehearing was denied on April 5, 1983.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 658 P.2d 501 (OkL.Cr. 1983).

JURISDICTION

This Court's jurisdiction is involved pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 63 O.S.Supp.1978, § 2-204 provides, in part, as follows:

"The controlled substances listed in this section are included in Schedule I.

* * *

"C. Any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, . . .

* * *

"10. Marihuana."

Title 63 O.S.Supp.1976, § 2-509 provides in part:

"All species of plants from which controlled dangerous substances in Schedules I and II may be derived are hereby declared inimical to health and welfare of the public, and the intent of the Legislature is to control and eradicate these species of the plants in the State of Oklahoma.

"1. It shall be unlawful for any person to cultivate or produce, or to knowingly permit the cultivation, production, or wild growing of any species of such plants, on any lands owned or controlled by such person, and it is hereby declared the duty of every such person to destroy all such plants found growing on lands owned or controlled by him."

STATEMENT OF THE CASE

Damon Tucker Anderson, a/k/a Chub Anderson (hereinafter referred to as the "petitioner"), was convicted of the crime of Unlawful Cultivation of Marijuana in violation of 63 O.S.Supp.1976, § 2-509, in the District Court of Rogers County, State of Oklahoma. The petitioner, who is represented by counsel, waived his right to a jury trial and the case was submitted to the Court for a determination of guilt or innocence based on the transcript of the preliminary hearing, exhibits and certain stipulations. The Court found the petitioner guilty and sentenced him to ten years in the custody of the Department of Corrections, six years of which were suspended, and fined the petitioner \$50,000.

The facts which were presented to the Court reveal that on August 6, 1980, agents Guyton and Harris of the Oklahoma State Bureau of Narcotics and Dangerous Drugs met with a confidential informant in the City of Bartlesville, Oklahoma (Tr. 7). The three then drove approximately 20 to 30 minutes to a rural location to the northeast of Bartlesville (Tr. 7,67). The agents and the confidential informant drove first in an easterly direction on the north side of Section 8, which is the section within which the petitioner's property was located. They then turned around and went around the section to a dirt and gravel road which goes on the

south side of Section 8. They then traveled in an easterly direction along this road (Tr. 7-8,157). The three drove along this road until they got to a fence where they parked, climbed the fence and proceeded by foot (Tr. 157-158). Agents Guyton and Harris both testified that along this road they observed no signs of any kind (Tr. 13,51,52,60,158,197).

Agent Guyton testified that their purpose in going to this particular place was to investigate a marijuana field, which the confidential informant had advised was at this location (Tr. 159).

The confidential informant walked with the two agents until they were approximately 250 yards south of the marijuana field (Tr. 159). The agents left the confidential informant at this point and walked to a place approximately 75 yards from the marijuana field where it then became visible (Tr. 159).

The agents then observed a marijuana patch the size of a football field (Tr. 31,64). The field was surrounded by an orange metal barbed wire fence (Tr. 159). Agent Guyton testified that the plants were from approximately six to thirteen feet tall and were green from apparent irrigation (Tr. 159,164). The agents were approximately ten yards from the fence before they positively identified the plants as being marijuana (Tr. 201). In the southwest corner of the marijuana field

was a water pump hooked up to an electric outlet with a hose running to a creek (Tr. 163).

The agents then went into the marijuana field approximately 20 feet (Tr. 163). Agent Guyton testified that the plants were so dense that he could not have seen someone five feet from him (Tr. 165). The agents entered the field to take samples of the marijuana and pictures of the field (Tr. 163).

While agents Guyton and Harris were inspecting the field, they heard someone approaching their location (Tr. 164). They observed the petitioner approach and saw him look at the irrigation pump and begin making adjustments on it (Tr. 165). The petitioner was carrying an arm load of marijuana stalks and was chopping other stalks with a knife (Tr. 165,166). The petitioner was carrying a .357 Magnum pistol as well (Tr. 17).

The petitioner began approaching the location where the agents were hidden and they decided that they should arrest him at this time (Tr. 166). The agents, after taking the petitioner into custody, went to Bartlesville, obtained a search warrant and returned to execute such at approximately midnight of the same day (Tr. 168).

After obtaining the search warrant, the agents went to the petitioner's residential trailer in Section 8 (Tr. 169). The distance between the residential trailer

and the marijuana field was estimated by different witnesses as being between 60 to 200 yards (Tr. 108), 75 yards (Tr. 140), 200 yards (Tr. 188) and 525 feet (Tr. 243). Agent Guyton testified that in his opinion the residential trailer was approximately 200 yards from the marijuana field and that it was approximately a seven to ten minute walk between the two points (Tr. 188-190). Agent Guyton also testified that the marijuana field was visible from the air (Tr. 193).

The agents, along with an Oklahoma Highway Patrol trooper and the sheriff of Washington County, executed the search warrant and found evidence of marijuana processing in a nearby shed, which was 30 to 40 yards from the residential trailer (Tr. 128,129). Inside the residential trailer were numerous amounts of marijuana, pipes, seeds, roach clips, booklets, papers and other paraphernalia (Tr. 176-180). The agents also found \$3,120 in cash in a safe in the house (Tr. 181).

REASONS WHY THE WRIT SHOULD BE DENIED

- I. THE OPINION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS IS CONSISTENT WITH EXISTING FOURTH AMENDMENT LAW IN THAT THE SEARCH OF THE PETITIONER'S PREMISES WAS MADE PURSUANT TO THE OPEN FIELDS DOCTRINE; FURTHERMORE, THIS IS NOT AN APPROPRIATE CASE FOR CERTIORARI SINCE THERE WAS CONFLICTING TESTIMONY CONCERNING THE EXISTENCE OF A SIGN ALONG A ROADWAY TO THE PETITIONER'S PROPERTY.

The State contends that the facts as set forth above reveal that the search was properly conducted in accordance with the "open fields" doctrine. See United States v. Knotts, ___ U.S. ___, 51 U.S.L.W. 4232, 4235 (U.S. March 2, 1983); Air Pollution Variance Board v. Western Alfalfa, 416 U.S. 861 (1974); Hester v. United States, 265 U.S. 57 (1924). The distinction between open fields and the privacy of the house is "as old as the common law." Hester v. United States, *supra*, 265 U.S. at 59.

The facts revealed that the petitioner was growing a marijuana field the size of a football field on land

which he was leasing. The field was visible from the air. In getting to the field, the narcotics agents traveled on a road which crossed a gate which was kept unlocked during the day (Tr. 249) and which was used by a pumper and a roustabout to get to and from a lease on the land (Tr. 252). The agents testified that they observed no signs prohibiting them from entering the property (Tr. 13,51,52,60,158,197).

The agents traveled what was characterized as an "open road" until they arrived at a fence, where they parked their vehicle (Tr. 13). No fence or gate lock was ever cut on the way to the marijuana patch. Cf. Florida v. Brady, 406 So.2d 1093 (1982), cert. granted, ___ U.S. ___, 50 U.S.L.W. 3934 (U.S. May 24, 1982).

The petitioner presented evidence that along the road which led to the fence there was a sign which stated "No Hunting," "Private Property" (Tr. 249-250; defendant's Exhibit No. 3). However, even if this testimony were true, the admonition falls short of that which prohibits entry onto land under Oklahoma law. Title 21 O.S.1981, § 1835(a) states:

"(a) Whoever shall willfully or maliciously enter the garden, yard, or enclosed field of another after being expressly forbidden to do so by the owner or occupant thereof shall be deemed guilty of trespass and upon conviction thereof shall be

fined in any sum not to exceed Twenty-five Dollars (\$25.00); provided, that anyone who willfully or maliciously enters any such garden, yard, or field, and therein commits or attempts to commit waste, theft, or damage shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00), or by confinement in the county jail for not less than thirty (30) days nor more than six (6) months, or both such fine and imprisonment." (Emphasis added)

Therefore, the statute above requires: (1) an "enclosed field" and (2) one to be "expressly forbidden" from entering such. The evidence revealed that there was no sign near either the fence that was crossed when the agents parked their vehicle or on the orange fence which immediately surrounding the marijuana patch. The sign by the open road in the present case, if it existed, is inadequate to prohibit entry onto the land in question. Cf. United States v. Oliver, 686 F.2d 356, 358 (6th Cir. 1982), cert. granted, ___ U.S. ___, 51 U.S.L.W. 3552 (U.S. January 29, 1983) ("No Trespassing" signs).

Furthermore, even if the agents were trespassing, this does not prohibit an open field search. Hester v. United States, supra, 265 U.S. at 58.

Finally, since there was a conflict in testimony as to the existence of the sign, it is submitted that fact makes this case a less than attractive one to be used as a vehicle for reexamination of the open fields doctrine. This apparently is what this Court is contemplating at this time. See United States v. Knotts, ___ U.S. ___, 51 U.S.L.W. 4232, 4236 (U.S. March 2, 1983) (Blackman, J., concurring). The trial court never made a specific finding as to which testimony he found to be true (Tr. of April 7, 1983 hearing, pp. 26-29), but merely overruled the Motion to Suppress.

II. THE SEARCH WARRANT ADEQUATELY DESCRIBED THE PLACE TO BE SEARCHED, THE ITEMS TO BE SEIZED AND CLEARLY SETS FORTH PROBABLE CAUSE FOR BELIEF THAT THE ITEMS SOUGHT WERE ON THE PROPERTY SEARCHED.

The petitioner contends that the search warrant in question is overly broad in its description of the items to be seized and the place to be searched. The petitioner also claims that the affidavit for the search warrant failed to supply sufficient information to support a finding of probable cause (Petition, pp. 16-17).

A review of the search warrant reveals that the description of property to be seized is more than adequate (See Affidavit for Search Warrant, Appendix I). Andresen v. Maryland, 427 U.S. 463 (1976). Furthermore, the place to be searched is adequately described (See Search Warrant, Appendix II).

With regard to the contention that the affidavit does not contain sufficient information to support the issuance of a search warrant, perusal of the affidavit demonstrates that this contention is also meritless (Affidavit, Appendix I). Gates v. Illinois, ___ U.S. ___, 51 U.S.L.W. 4709 (U.S. June 8, 1983).

CONCLUSION

For the reasons stated, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Attorney General of Oklahoma

DAVID W. LEE
Assistant Attorney General
Chief, Federal Division

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

Attorneys for Respondent

September, 1983

APPENDIX I - AFFIDAVIT

IN THE DISTRICT COURT OF WASHINGTON COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA)

ss.

MISCL. NO. 80-23

COUNTY OF WASHINGTON)

Lines:

AFFIDAVIT FOR SEARCH WARRANT

JOHN GUYTON

Affiant,

1. being first duly sworn, on oath deposes and says that the following
2. property constitutes evidence of the commission of a crime:
3. 1. Marihuana, in plant and/or any other form
4. 2. Instrumentalities used in the processing and cultivation of marihuana,
5. including compressors, scales, monies, records or receipts of marihuana trans-
6. actions, or other weighing or packaging devices, marihuana paraphernalia
7. and/or other smoking devices.
8. 3. Firearms
- 9.

10. and that the above mentioned property is now located as follows:
11. The field below-described in paragraph 4 below in this Affidavit.
12. The area immediately contiguous to said field.
13. May trailer on said property 1/4 to 1/2 mile to the south of the green metal
14. gate below-described on the road leading south off the section line road just N
15. of said green metal gate
16. Any other outbuildings on said property
17. in the City of _____ Washington County, State of
18. Oklahoma.

19. based upon the following facts:
20. 1. Affiant is an Agent with the Oklahoma Bureau of Narcotics and Dangerous
21. Drugs, stationed in Oklahoma City, OK.
22. 2. On 8-4-80, Affiant received a telephone call at his Oklahoma City office
23. from a citizen informant, whose identity must remain confidential for his
24. own safety, stating that he (the informant) was aware of, and had personally
25. seen within 3 or 4 days prior to his call, a large marihuana field near his
26. residence in Bartlesville, OK. He requested a personal meeting with
27. Affiant in Bartlesville, OK. On 8-6-80, Affiant and OSNDD Agent J.L. Harris
28. met with the informant in Bartlesville, and were then taken by the informant
29. within about 1/2 mile of the above-described field, which was visible from
30. that location. He also gave Affiant further directions as to how to approach
31. the marihuana field from the south about 1/4 mile from the field itself.
32. In order to make verification, if possible, of the informant's information,
33. Affiant and Agent Harris proceeded on foot to a field approximately 1/2 the
34. size of a football field. Prior to entering said field, Affiant could observe
35. that it was full of green growing plants of marihuana. Affiant has 8 years
36. experience as a police officer and OSNDD Agent, 5 years of which he has been
37. involved in narcotics investigation. He has seen and handled marihuana plants
38. hundreds of times, and has performed numerous field tests on some to determine
39. marihuana content, with positive results in later analysis by chemists. He
40. has also attended numerous seminars and police schools in which marihuana
41. plants were displayed. The appearance of the suspected marihuana plants from
42. outside the field where Affiant was standing on the above occasion was iden-
43. tical to the appearance of the numerous marihuana plants he has had experience
44. with on past occasions. Affiant and Agent Harris then entered the field to
45. make an open field search to determine on closer examination the nature of
46. the plants, and to further verify the informant's information. There were no
47. buildings or residences in the immediate area where Affiant and Agent Harris
48. entered. After proceeding about 20 feet into the field, and within about 3
49. minutes of entering, an individual approached from a northern direction.
50. Affiant and Agent Harris attempted to conceal themselves to avoid detection
51. and observed an individual later identified to Affiant as Damon "Chub" Ander-
52. son approaching. He was observed
53. to be harvesting marihuana plants
54. by cutting the stalks with (CONTINUED ON BACK)
55. Subscribed and sworn to before me this 4th day of August 19 80

Judge of the District Court
Washington County, Oklahoma

APPENDIX I - AFFIDAVIT (Continued)

CONTINUED FROM PAGE 1

(Page Two)

1. a large knife in his hand. Affiant also observed Anderson to be armed with
2. a handgun carried in a holster on his hip. Anderson was gathering said
3. marijuana plants under his free arm. Upon being unable to conceal themselves
4. further, Affiant and Agent Harris arrested Anderson after identifying them-
5. selves as officers. Soon thereafter, Affiant contacted local authorities to
6. assist in the preparation of this Affidavit for Search Warrant.
7. 3. When Affiant first met with the above-mentioned informant 8-6-80, he told
8. Affiant that he would take Affiant to the property "the back way," so he would
9. not be detected. He stated that the name of the individual cultivating the
10. marijuana in question was Chub Anderson. He also stated that Chub Anderson's
11. son Jeff Anderson was assisting his father in the marijuana cultivation oper-
12. ation. He stated that time was of the essence, in that he knew that Chub
13. Anderson was harvesting the marijuana at that time, from conversations with
14. unnamed other individuals. At this point Affiant accompanied the informant
15. to the above-described location. The informant took Affiant north from
16. Bartlesville on US Highway 75 through Dewey, OK, proceeding north 3 miles
17. from the intersection of Don Tyler Avenue in Dewey to a section line road
18. (east-west) intersecting US 75 about one mile north of the cemetery just
19. north of Dewey. Thence east about 3.6 miles to a green metal gate on the south
20. side of the section line, which gate was open. At this location the informant
21. stated that Chub Anderson resided in a trailer house 1/4 to 1/2 mile inside
22. the green metal gate which was near a welding building and other undescribed
23. buildings. The informant then took Affiant .7 miles west to the first
24. north-south section line intersecting the original section line mentioned
25. above west of the green metal gate. Thence south on the north-south section
26. line about 1 mile to a point where said section line curves left (east), and
27. at which point a trailer house sits on the northeast corner of the curve.
28. Thence east on the same section line past several oil storage tanks beside
29. the road. Thence across a dry creek bed, and approximately another 1/4 mile
30. east to the edge of another creek bed and a barbed wire fence. Affiant ob-
31. served orange plastic piping on the ground at this location. Affiant, Agent
32. Harris and the informant then proceeded on foot to the north to a point about
33. 2 city blocks S of the fence bordering the above-described marijuana field
34. on its southern edge. Affiant and Agent Harris then entered the field as
35. described in paragraph 2 above.
36. 4. From his experience in narcotics and marijuana investigations, Affiant is
37. aware that, once growing marijuana is harvested, the cultivators, prior to
38. marketing same, dry it, strip it and package. There is a reasonable possibil-
39. ity that there will be near the above field, facilities for performing the above-
40. processing activities, such as a compressor (like a trash compactor) or other
41. device used to compact marijuana into marketable size packages, scales or
42. other weighing devices, records and/or receipts of past such transactions.
43. monies, other marijuana in any form, marijuana paraphernalia and/or smoking
44. devices.
45. 5. The handgun found on Chub Anderson's person was a loaded .337 Ruger
46. Security Six magnum handgun. Affiant has been informed that Chub Anderson
47. is a convicted felon, having received a 7 year sentence in the District
48. Court of McCurtain County, OK in 1963 for the felony offense of Larceny of
49. Domestic Animals, paroled in 1966. His possession of the above handgun in
50. is therefore a felony offense of Carrying a Firearm After Former Conviction
51. of a Felony, 21 O.S. 1283.

APPENDIX II - SEARCH WARRANT

THE DISTRICT COURT OF WA. WASHINGTON COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA }
COUNTY OF WASHINGTON) ss.

WISCL. NO. 100

SEARCH WARRANT

IN THE NAME OF THE STATE OF OKLAHOMA,
TO: ANY SHERIFF, POLICEMAN OR LAW ENFORCEMENT OFFICER IN WASHINGTON
COUNTY, STATE OF OKLAHOMA.

Affidavit having been sworn to by the Affiant (s) JOHN CUTTON

Before me this day, based upon the facts stated therein, probable
cause having been found, I command you at any time of the day (or
night) to make immediate search of the following described property
and things, and if you find the same or any part thereof to bring
it forthwith before me at my office at Bartlesville, Oklahoma:
1. Marijuana, in plant and/or any other form
2. Instrumentalities used in the processing and cultivation of a marijuana, inc:
compressors, scales or other weighing devices, moneys, receipts or records of m
huana transactions, or other weighing or packaging devices, marijuana paraph
alia and/or other smoking devices.
3. Firearms

together with other related fruits, instrumentalities and evidence of
the crime. I further find that the property is on the person or in the
place to be served and that there is a likelihood that the property
named in this Search Warrant will be destroyed, moved or concealed
and that this warrant may be served in the night time.

Said search to be conducted at the following described location:
in the field located at the following location: north on US 75, 3 miles from Don
Tyler Ave, Dewey, OK, to a section line and intersecting US 75. Thence east 1.6
miles on said section line road approximately 5 miles, then
south of on an intersecting north-south section line, about 1 mile, turning east
said road where it curves past a trailer, then proceeding east on said road p
several oil field tanks, then across a dry creek bed, then east another approx
1/4 mile to a second creek bed and barbed wire fence with orange plastic pi
on the ground. Thence northeast across the second creek bed across an open field
about 500 yards across a creek bed to the north, to a fence turning east-
west, which borders a field containing green growing plants on its southern edge.
In a trailer house and/or outbuildings which is located by travelling N on US
3 miles from Don Tyler Ave, Dewey, OK thence east on a section line road 5.6 mile
thence south through a green metal gate following the road which leads from said
section line through said green metal gate to said trailer.

In Witness my hand Washington County, Oklahoma.

Issued under my hand this 6th day of August 19 88

[Signature]
Judge of the District Court
Washington County, Oklahoma

END OF DOCKET